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February 5, 2019

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FEB 05 2019

EXECUTIVE OFFICE

VIA HAND DELIVERY

Mr. Toby Baker
Executive Director
Texas Commission on Environmental Quality
Building F, Fourth Floor
12100 Park 35 Circle
Austin, Texas 78753

RE: Petition for Rulemaking to Amend 30 Texas Administrative Code ("TAC") § 295.159

Dear Executive Director:

Pursuant to Texas Government Code § 2001.021 and 30 TAC § 20.15, the City of Wichita Falls (the "City") hereby files the enclosed Petition for Rulemaking (the "Petition") to amend the Texas Commission on Environmental Quality's ("Commission") rule governing notice of extension of time to commence or complete construction of a reservoir found at 30 TAC § 295.159. The City requests that this Petition be set for consideration and Commission action and looks forward to working with all concerned on this matter.

If you have any questions regarding this Petition, please feel free to contact me at (512) 322-5876; sthornton@lglawfirm.com.

Sincerely,



Sara R. Thornton

SRT/ald

Enclosure

cc: (via electronic transmission only)
Mr. Russell Schreiber
Mr. Daniel Nix
Ms. Sarah Collins

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FEB 05 2019

PETITION FOR RULEMAKING
BY THE CITY OF WICHITA FALLS
TO AMEND THE RULE
GOVERNING NOTICE OF
EXTENSION OF TIME TO
COMMENCE OR COMPLETE
CONSTRUCTION OF A
RESERVOIR

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EXECUTIVE OFFICE
BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

ORIGINAL PETITION FOR RULEMAKING

TO THE HONORABLE COMMISSIONERS:

The City of Wichita Falls (the “City”) respectfully requests the Texas Commission on Environmental Quality (“TCEQ” or the “Commission”) institute rulemaking to amend 30 Texas Administrative Code (“TAC”) § 295.159 (the “Amendment”) concerning the requirement of notice for an extension of time to commence or complete construction of a reservoir. The City submits this petition (the “Petition”) pursuant to Texas Government Code § 2001.021 and 30 TAC § 20.15, and respectfully shows the following:

I. Public Policy Benefits

The City submits the Petition to further the State of Texas’ ongoing interest in securing sufficient water supplies to serve the growing population of the state over the upcoming 50 years and beyond, consistent with state and regional water supply planning. In the event of a drought of record in 2020, the 2017 Texas State Water Plan (“Water Plan”) estimates that Texas needs an additional 4.8 million acre-feet of water per year to sustain the state’s population.¹ By 2070, the Water Plan estimates the need to increase to 8.9 million acre-feet per year.² To address some of these needs, the Water Plan recommends 26 new, major reservoir projects as a primary water

¹ Texas Water Development Board, 2017 Texas State Water Plan, *Water for Texas* 7.

² *Id.*

management strategy.³ Reservoir projects, particularly on-channel reservoirs impounding in excess of 50,000 acre-feet of water, present significant challenges in planning and permitting, in part because they require both state and federal permits to authorize the diversion and impoundment of state water and also to authorize dredging and filling activities under federal law. Both permitting processes are independent, are complex in their analyses, and provide substantial opportunities for public comment and legal challenges to issuance of the final authorization. As a result, years are typically required to complete each permitting process—from development of the application and supporting materials through resolution of the last legal challenge to permit issuance. These lengthy processes often result in the staggered completion of final state and federal authorizations. For example, the applicant for the Lower Bois d’Arc Creek Reservoir project filed its application for a state water right in 2006 and received the water right in 2015 and filed its federal Clean Water Act § 404 permit application in 2008 that was not issued until 2018.

Current state law requires an applicant for a reservoir project to issue a second basin-wide notice in the event that federal permitting lags behind state permitting and requires a new date of proposed commencement of construction more than four years from the date of issuance of the state water use permit (or if the new proposed completion time is more than five years from the date of completion required in the original water use permit). Basin-wide notice in such instance opens up a state-permitted reservoir project to an unnecessary second round of public comment and, potentially, protests—despite the fact that the Commission has already taken its final action to issue a water use permit following a sufficient opportunity for the public to comment and protest that permit. Delays in the federal permitting process should not dictate the additional, wasteful

³ *Id.* at 8–9, 94–95.

expenditure of state resources where the Commission has already reached a reasoned and supported conclusion on the application with the benefit of, and opportunity for, public input.

The Amendment creates a tailored exemption from the requirement to provide notice of extension of the time to commence or complete construction that effectively prevents the federal permitting process from driving redundant and wasteful notice on the state level. Specifically, the Amendment carves out an exception applicable only to a permit for construction of a reservoir designed for storage of more than 50,000 acre-feet of water. Such amendment better enables state and local governmental entities to address critical water supply needs in a timely manner by preventing a delayed federal permitting process from unnecessarily extending the time and resources required for the state permitting process.

The Amendment is essential to facilitate the permitting and construction of critical reservoir projects and is consistent with similar exemptions found in the Texas Water Code for water supply reservoirs with a storage capacity of over 50,000 acre-feet. Under the Amendment, duplicative state administrative processes are avoided where the underlying application and project design have remained the same, thereby decreasing needless delays and unnecessary expenditures of state resources while preserving the opportunity for public involvement in the initial state water rights permitting process. Moreover, it prevents protestants of the reservoir project from effectively getting a “second bite at the apple” that unduly burdens the applicant for the reservoir project and can significantly delay a critical water supply from becoming available to the public that so desperately needs it.

II. Petitioner’s Name and Address

The Petitioner’s name is the City of Wichita Falls, a home rule municipality that supplies approximately 104,553 citizens with wholesale and retail water service. Petitioner’s address is

1300 7th Street, Wichita Falls, TX 76307-7531. For purposes of this Petition, please direct correspondence to Ms. Sara Thornton at 816 Congress Ave., Ste. 1900, Austin, Texas 78701.

III. Brief Explanation of the Amendment

The City proposes the Amendment as an effort to improve consistency between the Texas Water Code and the TAC regarding exclusion of water storage reservoirs of more than 50,000 acre-feet of water from certain deadlines by which construction must begin. The Amendment would facilitate the efficient state permitting of such reservoirs despite any potential delays in federal permitting in order to prevent the waste of state resources and to enable the timely construction of reservoir projects central to the Water Plan. The City drafted the Amendment to provide a tailored exemption from the general requirement to provide notice of extension of the time to commence or complete construction, applying only to water storage reservoirs of more than 50,000 acre-feet.

IV. Text of the Amendment

The text of the Amendment is provided as Appendix A of this Petition.

V. Statement of Legal Authority for the Amendment

The Amendment is proposed to be adopted pursuant to the following authority:

- a. Texas Water Code § 5.013, which grants the Commission general jurisdiction over surface water rights permitting.
- b. Texas Water Code §§ 5.102 and 5.103, which authorize the Commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code.
- c. Texas Water Code § 11.121, which grants the Commission the exclusive authority to permit the appropriation of state water before any person begins construction of any work designed for the storage, taking, or diversion of water.

- d. Texas Water Code § 11.129, which grants the Commission the authority to review a water use application and determine whether it complies with the requirements of Chapter 11.
- e. Texas Water Code § 11.132, which grants the Commission the authority to adjudge what persons may be affected by an application for purposes of notice.
- f. Texas Water Code §§ 11.134 and 11.135, which grant the Commission the authority to make a final written decision and to grant or deny an application for a water use permit.
- g. Texas Water Code § 11.140, which grants the Commission the authority to issue permits for storage of water solely for the purpose of optimum development of projects.
- h. Texas Water Code § 11.145, which provides when a permittee must commence construction of facilities and reservoirs and allows for extensions of time to construct reservoirs.
- i. Texas Water Code § 11.146, provides that if the permittee takes no action to commence construction then the Commission in some cases may institute proceedings to forfeit or cancel the permit; reservoirs designed for storage of more 50,000 acre-feet are exempt from this statute.
- j. Texas Water Code §§ 16.051 and 16.053, which direct that state and regional water plans shall identify sites of unique value for reservoir construction in order to carry out the policy of Article 3, Section 49-d(a) of the Texas Constitution to encourage the optimum development of the limited number of feasible sites available for the construction or enlargement of dams or reservoirs.
- k. The 2017 State Water Plan, *Water for Texas 2017*, which recognizes that new water supply and storage reservoir projects are a primary water management strategy to meet the growing needs for water by the people of Texas

VI. Injury or Inequity Resulting from Failure to Adopt the Amendment

The Amendment is critical to the City, and other water suppliers, for the following reasons:

1. The Amendment is needed to enable the efficient and timely permitting and construction of the Lake Ringgold project for which state permitting is ongoing but federal permit shall soon commence;
2. The Amendment is needed to prevent duplicative public notice, hearing, and protest opportunities that already exists for downstream water rights holders and others opposed to Lake Ringgold;
3. The Amendment is needed to prevent federal permit process delays from driving a repetitive state process that is contrary to legislative intent, contrary to the public interest, and wasteful of state resources;
4. The Amendment is warranted to give effect to the legislative intent of §§ 11.145(b) and 11.146(g).

The City is dedicatedly engaged in long-range water planning in order to meet the water supply needs for municipal, agriculture, industry, and mining purposes within its service area. The City's current primary source of water supply is Lake Arrowhead. As an integral part of its water supply plan, the City intends to construct the Lake Ringgold, a project that is included in the Water Plan and designed to impound 275,000 acre-feet of water to serve as a supplement to the City's existing water supplies. In 2015, the 84th Texas Legislature passed House Bill 1042 to re-designate the Lake Ringgold reservoir as a "unique" reservoir site, meaning that the Legislature recognized the site is of unique value for reservoir construction. The City is diligently pursuing the authorizations required to construct Lake Ringgold, including filing a state water use permit application in 2017 that is still under review by Commission staff. The City intends to also file an

application with the U.S. Army Corps of Engineers for an individual permit pursuant to Section 404 of the Clean Water Act (“CWA 404 permit”) to authorize the dredge and fill activities associated with reservoir construction. Based upon the experiences of other reservoir projects in various stages of permitting and development in the state, it appears likely that the timeframe from application to issuance of a state water use permit will be significantly less than the timeframe for a federal CWA 404 permit. In the case of Lake Ringgold specifically, the federal permit may not issue until more than four years after issuance of the state permit, which would trigger the duplicative notice requirement of 30 TAC § 295.159. The application of the current rule creates unnecessary inefficiencies and expense due to the failure of the current rule to recognize the legislative intent for water supply reservoirs that store over 50,000 acre-feet of water to be exempt from certain limitations on timing of construction.

State statutes already recognize that some general rules regarding penalties for failure to initiate or complete construction may not be appropriate to apply to a sizeable reservoir project. As drafted, the Amendment is consistent with Texas Water Code §§ 11.145(b) and 11.146(g), which contemplate similar exemptions for water storage reservoir construction timelines. Texas Water Code § 11.145(a) establishes the general rule that, if a permit is for appropriation by direct diversion, then construction of the proposed facilities is to begin not more than two years after the date the permit is issued. However, Texas Water Code § 11.145(b) enables the Commission to enter an order of record to extend the time for beginning construction of a storage reservoir beyond those two years and also allows the optional assessment of a fee not to exceed \$1,000. Texas Water Code § 11.146(g)—which addresses forfeiture and cancellation of permits for inaction within the timeframe specified in Section 11.145—specifically states that “[t]his section does not apply to a permit for construction of a reservoir designed for the storage of more than 50,000 acre-

feet of water.” Thus, it is within the Commission’s authority, and consistent with the Texas Water Code, to adopt the Amendment and exclude reservoirs designed for over 50,000 acre-feet of storage from the current requirement to provide basin-wide notice of the extension of time to commence or complete construction. This change complements the similar exclusion provided by Texas Water Code § 11.146(g) and enables the Commission to extend the time for such a reservoir project to begin construction by simple order and collection of a fee rather than the reissuance of notice. Again, the Amendment is consistent with the Texas Water Code and would facilitate the efficient permitting and construction of the Lake Ringgold reservoir, as well as other critical reservoir projects recommended by the Water Plan as water management strategies necessary to meet the growing water demands of the state.

VII. Prayer

WHEREFORE, premises considered, the City respectfully requests that the Commission consider this Petition, and the Amendment as proposed herein, and initiate proceedings necessary to adopt the Amendment. The City further prays for any and all other relief to which it may be entitled.

Respectfully submitted,

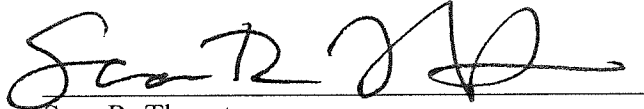
**LLOYD GOSSELINK BLEVINS
ROCHELLE & TOWNSEND, P.C.**

816 Congress Avenue, Suite 1900

Austin, Texas 78701

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A handwritten signature in black ink, appearing to read "Sara R. Thornton", written over a horizontal line.

Sara R. Thornton

State Bar No. 24066192

Sarah W. Collins

State Bar No. 24093343

**ATTORNEYS FOR CITY OF WICHITA
FALLS**

Appendix A

Text of Proposed Amendment to Rule

30 Texas Administrative Code § 295.159—Notice of Extension of Time To Commence or Complete Construction

(a) If the new date of proposed commencement of construction is more than four years from the date of issuance of the permit, or if the new proposed completion time is more than five years from the date of completion required in the original permit, notice of an application for extension of time shall be mailed and published as required by the Texas Water Code, § 11.132 and §11.143, and §295.151 of this title (relating to Notice of Application and Commission Action), §295.152 of this title (relating to Notice by Publication), and §295.153 of this title (relating to Notice by Mail). The chief clerk shall mail notice of the public hearing to the same persons to whom notice of the application for the permit was mailed. The applicant shall be required to publish notice of the hearing in the same manner in which an applicant for a water use permit is required to publish notice of an application. No other notice is required.

(b) The notice of any application for an extension of time to commence or complete construction must provide that the commission shall also consider whether the appropriation shall be forfeited for failure by the applicant to demonstrate sufficient due diligence and justification for delay.

(c) This section does not apply to a permit for construction of a reservoir designed for storage of more than 50,000 acre-feet of water. No notice shall be required for an extension of time to commence or complete construction of a reservoir designed for storage of more than 50,000 acre-feet of water.